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86-26

No. 85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED

Petitioner,

vs.

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Respondent.

PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Eleventh Circuit's error in applying Florida Procedural Law, permitting direct actions against marine liability insurers in cases brought pursuant to the Federal Court's admiralty and maritime jurisdiction, is an invitation to forum shopping which is the antitheses of the purpose of the U.S. Const. art. III § 2, which was intended to insure uniformity in admiralty and maritime cases.

LIST OF PARTIES

The parties to the proceedings below were the petitioners: The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited; Pateras Brothers, Ltd.; Pateras Investments, S.A.; Kittiwake Compania Naviera, S.A.; M/V WESERMUNDE; Marquis Compania Naviera, S.A. and the respondent: State Establishment for Agricultural Product Trading.

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IN THE

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STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

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PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 25, 1986.

OPINION BELOW

The opinion below consists of the following decisions (listed chronologically):

1. Order of December 20, 1983 entered by the United States District Court for the Middle District of Florida, Tampa Division.

2. Order of January 13, 1984 entered by the United States District Court for the Middle District of Florida, Tampa Division.

3. Judgment entered by the United States Court of Appeals for the Eleventh Circuit dated February 25, 1986.

4. Order of April 7, 1986 Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

JURISDICTION

The Judgment of this Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on February 25, 1986. A timely Petition for Rehearing en banc was denied on April 7, 1986, and this Petition was Certiorari will be filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

On or about March 30, 1982, 82,073 cases of fresh eggs were loaded onboard the M/V WESERMUNDE at Tampa, Florida for carriage to Aqaba, ultimate destination Iraq. After arrival at Aqaba, a fire onboard the vessel destroyed the cargo. The loss was the result of various Defendants' breach of their duties as ocean carriers, under contract and tort theories.

The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited was named as a Defendant as the liability underwriter for the vessel and its owners. There is no allegation that the UK Club breached any contract or committed any tort.

This action was brought pursuant to the admiralty and maritime jurisdiction of the Court. It is also alleged that it is brought pursuant to diversity jurisdiction, but plaintiff's further allegations establish that diversity does not exist since all of the parties are foreign.

REASON FOR GRANTING THE WRIT

The Eleventh Circuit Erred In Applying Florida-Procedural Law, Permitting Direct Actions Against Marine Liability Insurers, In Cases Brought Pursuant To The Federal Court's Admiralty And Maritime Jurisdiction. The Decision Invites Forum Shopping And Will Erode Uniformity, Contrary To The Intent Of art. III § 2 Of The Constitution.

This case should be heard and reversed in order to preserve uniformity in admiralty and maritime cases brought in United States Federal Courts and to avoid wholesale forum shopping in maritime and admiralty cases.

The drafters of U.S. Const. art. III § 2 and the First Congress recognized the necessity to have uniformity in cases falling within the admiralty and maritime jurisdiction of the federal courts. Mr. Justice Frankfurter in his concurring opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368 (1955) pointed out that there are requirements for nationwide maritime uniformity. *See also Offshore Logistics, Inc. v. Tallentire, 54 U.S.L.W. 4745 (U.S. June 23, 1986)(No. 85-202).* The need for a uniform admiralty and maritime policy is a result of the national and international scope of maritime trade. The present case is a good example of why uniformity

is necessary in admiralty and maritime cases. A charter party for the vessel in question was entered into in England and eggs were loaded and bill of lading was issued in Tampa, Florida. The eggs were destined for Iraq and allegedly lost in Jordan.

The court in this case adopted Judge Godbold's ruling in *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir. 1986). In *Steelmet* Judge Godbold ruled that direct actions against liability insurers should be permitted in admiralty and maritime cases brought in Florida. The basis for permitting direct action was a series of Florida Supreme Court cases starting with *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969), wherein joinder of a liability insurer was permitted. Subsequently, the Florida Supreme Court decided that *Shingleton* created only a procedural right of joinder. *Markert v. Johnston,* 367 So.2d 1003 (Fla. 1978). This proposition was affirmed by the Florida Supreme Court in *Hertz Corporation v. Piccolo,* 453 So.2d 12 (Fla. 1984), wherein the court stated:

> In *Market v. Johnston,* 367 So.2d 1003 (Fla. 1978) and *Cozine v. Tullo,* 394 So.2d 115 (Fla. 1981), this Court held that joinder of the insurer was a procedural matter, and not within the province of the legislature to control.

Id. at 15.

Florida never recognized a substantive right of action against marine liability insurers. It is clear that as a procedural rather than substantive right of joinder, the Florida Supreme Court was not interested in changing the rights of the parties, but was merely stating how the Florida courts would procedurally

handle cases filed in Florida. The procedure created by the Florida Supreme Court in *Shingleton* is contrary to Federal maritime law. In *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455, 460 (5th Cir. 1982), reversed in part on other grounds, 706 F.2d 1365 (5th Cir. rehearing 1983), the court stated, "Federal admiralty law provides no general right to sue an insurance company directly. . . ."

There is no case law supporting the proposition that a Federal court hearing a case on the basis of admiralty and maritime jurisdiction should adopt state procedure.

In *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608 (1954) the Court was dealing with a statute creating a substantive right for injuries occurring within the jurisdiction of the state.

> There can be no constitutional barrier to this Louisiana Law passed to protect persons *injured within its borders.*

347 U.S. 409 at 432, 74 S.Ct. at 620 (emphasis added).

Such a substantive statute was not before the Eleventh Circuit in *Steelmet* or in this case where the court adopted state procedures in Federal Courts in admiralty and maritime cases, the total antithesis of a uniform system of justice as was envisioned by the drafters of the U.S. Const. art. III § 2. Justice Frankfurter stated in his concurring opinion in *Wilburn Boat, supra*:

> Is it to be assumed that were the Queen Mary, on a world pleasure cruise to touch at New York City, New Orleans and Galveston,

> a Lloyds policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas? Such an assumption, I am confident, would not prevail were decision necessary.

Id. at 348 U.S. at 323, 75 S.Ct. at 375.

According to the *Steelmet* decision, followed in the instant case, a plaintiff in an admiralty and maritime case can search all of the states where he can find sufficient minimum contacts to obtain in personam jurisdiction over the defendant, irrespective of where the alleged loss occurred, and choose the forum whose procedures best suit plaintiff's purpose. To allow the decision in this case to stand is to call for forum shopping and to destroy uniformity of the admiralty and maritime law of the United States.

CONCLUSION

For the above reasons a writ of certiorari should be granted. The rationale of *Steelmet* should be overruled and this case should be reversed in order to preserve uniformity of the law in admiralty and maritime cases and to avoid forum shopping.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-3041

D.C. Docket No. 83-541

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,
Plaintiff-Appellant,

versus

M/V WESERMUNDE, etc., *et al.*,
Defendants-Appellees.

No. 84-3161

D.C. Docket No. 83-413-13

GREAT AMERICAN INSURANCE COMPANIES,
Plaintiff-Appellant,

versus

UITERWYK LINES LTD., *et al.*,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Before VANCE and ANDERSON, Circuit Judges, and HENLEY,* Senior Circuit Judge.

---

* Honorable J. Smith Henley, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and ajudged by this Court that the judgments of the said District Court in this cause be and the same are hereby, REVERSED; and that these causes be and the same are hereby REMANDED to said District Court.

It is further ordered that defendants-appellees pay to plaintiff-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 25, 1986
For the Court: Spencer D. Mercer, Clerk

By: /s/ WARREN A. GODFREY
WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: APR 23 1986

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84-3041

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Plaintiff-Appellant,

versus

M/V WESERMUNDE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 11 Cir., 198__, ___ F.2d ___).
( )

FILED
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Before VANCE and ANDERSON, Circuit Judges and HENLEY*, Senior Circuit Judge.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on

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* Honorable J. Smith Henley, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

/s/ Robert S. Vaurx
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-541-Civ-T-15

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Plaintiff,

vs.

M/V WESERMUNDE, etc., et al.,

Defendants.

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ORDER

The Court has for consideration plaintiff's motion for reconsideration and for leave to amend its complaint, filed December 29, 1983. Defendant has not filed a response to this motion within the time limits prescribed in Local Rule 3.01(b).

This is a suit brought under the Court's admiralty jurisdiction. Defendant Unitd Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, (the UK Club) moved to dismiss the complaint against it. On December 20, 1983 the Court granted this motion. Plaintiff now moves for reconsideration of that Order, and requests oral argument on the issue. Alternatively, plaintiff requests leave to amend its complaint to properly allege a cause of action against the UK Club.

The issue involved here is whether a plaintiff can bring a direct action against a liability insurer in a suit brought under a federal court's admiralty and maritime jurisdiction. The parties agree that generally, maritime law prohibits such direct actions. *In Matter of Brent Towing, Inc.,* 414 F.Supp. 131, 133 (N.D. Fla. 1976). The parties disagree on whether the law of Florida would permit an exception to this general prohibition on direct actions in the maritime context.

In support of its motion for reconsideration, plaintiff once again cites the case of *American Eastern Development Corp. v. Everglades Marina,* 608 F.2d 123 (5th Cir. 1979). In that case, the owner of a marina had set fire to his establishment, thereby destroying some boats. The owners of those vessels brought suit against the marina and its insurer. The federal district court decided that the case came within the ambit of admiralty jurisdiction, and held for those plaintiffs against the defendant insurance company. On appeal, the Fifth Circuit certified a question on state law to the Florida Supreme Court. Essentially, the federal appellate court asked whether state public policy prevented third-party beneficiaries of an insurance policy from recovering under that policy when the insured intentionally caused the loss. The state Supreme Court agreed with the federal District Court, and refused to impute the criminal acts of the insured to the third-party beneficiaries. In that entire litigation, there is absolutely no indication that the defendant insurance company ever challenged whether a direct action suit could be brought against it. The parties there, as well as the courts involved, never addressed the question involved in the case currently before the Court. *Everglades Marina* merely dealt with a public policy issue implicated when an insured intentionally caused a loss.

The other case cited by plaintiff in support of its motion for reconsideration is likewise unpersuasive. In *Quinones v. Coral Rock, Inc.,* 258 So.2d 485 (Fla. 3d DCA 1972),

the plaintiff had brought a suit in state court for maritime personal injuries. The state appellate court held that under the joinder cases which were effective at that time, the plaintiff there could have joined the defendant's insurance company. That case also never dealt with the question involved here; whether the general federal maritime law's prohibition against direct actions can be superseded by Florida case law. The *Quinones* court merely held that under state joinder decisions in effect at that time, plaintiff could amend his complaint to join the insurance company. The Court notes that those joinder decisions have been effectively overruled by both the Florida courts and the State Legislature. *Fla. Stat.* 627.7262 (1982); *VanBibber v. Hartford Accident & Indemnity Insurance Company,* _ So. 2d ___ ; 8 FLW 406 (Oct. 14, 1983).

In sum, the Court is unpersuaded by plaintiff's newly cited case law. While a few plaintiffs might have successfully sued maritime insurers under the now defunct state law on joinder of insurance companies," . . . the general rule of not allowing insurers to be joined should, for uniformity in admiralty practice, be followed unless clear grounds for an exception exist." *In Matter of Brent Towing, supra,* at 133. No such grounds exist here, especially in light of recent developments in state law.

Plaintiff's request for leave to amend its complaint is likewise without merit. Despite any increased clarity which a new complaint might include, plaintiff simply cannot state any facts which will allow suit against a vessel's insurer in a maritime case brought in a Florida Federal District Court. Therefore, it is

ORDERED:

1. Plaintiff's motion for oral argument is denied.

2. Plaintiff's motion for reconsideration is denied.

DONE AND ORDERED at Tampa, Florida this 13th day of January, 1984.

/s/William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-541-Civ-T-15

STATE ESTABLISHMENT FOR
AGRICULTURAL PRODUCT TRADING,

Plaintiff,

vs.

M/V WESERMUNDE, etc., *et al.*,

Defendants.

FILED
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ORDER

The Court has for consideration a motion to dismiss filed by defendant The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited (the UK Club) alleging that the complaint does not state a claim upon which relief can be granted.

Plaintiff is an Iraqi corporation which owned over 80,000 cases of fresh eggs being shipped from Tampa, Florida to Aqaba in the Middle East. The eggs were not delivered to plaintiff at their port of destination. Plaintiff alleges that the eggs were not delivered because of negligence on the part of the vessel owner and the carrier. Although the complaint is rather cryptic, it appears that the eggs were

probably damaged or destroyed by a fire at sea.[1] Plaintiff filed this complaint as a cargo damage admiralty and maritime claim against the allegedly negligent parties. It alleges that the UK Club is an insurance organization whose policy insured against such cargo losses.

In its motion to dismiss, UK Club argues that plaintiff cannot state a claim upon which relief can be granted because general maritime law does not permit a direct action against a liability insurer. Plaintiff agrees with this general proposition, but argues that the Court should look to Florida law which might permit such an action. A short review of the pertinent maritime and Florida insurance law is necessary to determine the validity of this argument.

The United States Constitution gives federal courts jurisdiction over admiralty and maritime cases. *U.S. Const. Art. III, § 2.* Federal courts apply general maritime law in exercising this jurisdiction. *Maragne v. States Marine Lines,* 398 U.S. 375 (1970); G. Gilmore & C. Black, *The Law of Admiralty,* 2 ed. § 47 (1975). It is clear that state law is invalid if it actually conflicts with federal maritime law. *Id.,* p. 48. However, state law can be used to fill in gaps left by general maritime principles. *Wilburn Boat Company v. Fireman's Fund Insurance Company,* 348 U.S. 310 (1955). This interstitial use of state law in admiralty cases is not a universally applied principle. *Atlantic Coast Line R.R. Company v. Erie Lackawanna R.R. Company,* 406 U.S. 340 (1972); *Kossick v. United Fruit Company,* 365 U.S. 731 (1961). In sum, conflicts between state and federal law in admiralty cases must be resolved on a case by case basis, despite the oft repeated allegiance to "general maritime law."

---

[1] Paragraph 14 of the complaint alleges that the eggs were lost or damaged because the vessel was improperly manned and equipped. Subsection (d) of that paragraph alleges that the carrier was negligent in not taking necessary steps to prevent the spread of fire.

The parties agree that general maritime law usually prohibits actions against insurance companies. However, some jurisdictions have enacted statutes authorizing direct actions against liability insurers. LSA-RS § 22.655 (Louisiana); 26 LPRA § 2001 *et seq.* (Puerto Rico). Initially, it was not clear if the Louisiana statute was viable in a limitation of liability proceeding in admiralty. *Maryland Casualty Company v. Cushing*, 347 U.S. 409 (1954) involved an extraordinary 4-1-4 division in which the Supreme Court could only agree on procedures to be followed in this situation. That case was remanded to the Fifth Circuit Court of Appeals, which over the years had upheld the vitality of Louisiana's direct action statute in an admiralty context. *Olympic Glass Towing Corporation v. Nebel Towing Company, Inc.*, 419 F.2d 230 (5th Cir. 1969); *Alcoa S.S. Company v. Charles Ferran & Company, Inc.* 443 F.2d 250 (5th Cir. 1971). *But See Continental Oil Company v. The London Steam-Ship Owner's Mutual Insurance Association, Ltd.*, 417 F.2d 1030 (5th Cir. 1969) (Outer Continental Shelf Lands Act 43 U.S.C. § 1331; *et seq.*, preempts Louisiana's direct action statute). A maritime claimant may also bring a direct action against an insurer under the Puerto Rico law. *Ema v. Compagnie Generale Transatlantique (The S.S. Antilles), 353 F.Supp. 1286 (D.P.R. 1972). In states without direct action statutes, maritime claimants have not fared as well. Complaint of Harbor Towing Corporation*, 335 F.Supp. 1150 (D. Md. 1972); *Pettus v. Jones & Laughlin Steel Corporation*, 322 F.Supp. 1078 (W.D. Pa. 1971); *In re Pacific Inland Navigation Company*, 263 F.Supp. 915 (D. Haw. 1967).

Defendant UK Club contends that the absence of a Florida direct action statute dooms plaintiff's case against the insurer. Plaintiff replies with an argument based on *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969). In that case, the Florida Supreme Court held that an injured person is a third-party beneficiary of liability insurance contract, and

can bring suit simultaneously against both the insured and the insurer.

Developments since the *Shingleton* decision are important in determining whether plaintiff can use the principle of that decision in the admiralty context. In the years following *Shingleton*, several maritime plaintiffs unsuccessfully attempted direct action suits against maritime insurers within this District. *See Meyers v. F/V Mary Gus*, 72-121 Civ-T-H (M.D. Fla. order of January 4, 1974); *Turner v. Honduras Seafood Company, Inc.*, 74-64 Civ-T-H (M.D. Fla. order of January 16, 1974); *In the Matter of Brent Towing, Inc.*, 414 F.Supp. 131 (N.D. Fla. 1975). In 1977, the Florida Legislature attempted to do away with the rule of *Shingleton* by prohibiting joinder of a motor vehicle liability insurer in any action to determine the liability of the insured. Fla. Stat. § 627.7262 (1977). The state Supreme Court protected the judicially created right to direct action by striking down the 1977 statute. *Markert v. Johnson*, 367 So.2d 1007 (Fla. 1978). Even after the *Markert* decision retained the court created direct action, yet another maritime plaintiff failed in an attempt to bring a suit against a maritime underwriter. *Shivunkar Singh v. Faithful Trawler Company, Inc.*, No. 81-102 Civ-T-H (M.D. Fla. order of February 1, 1982.)

In 1982, the Florida Legislature renewed its efforts at keeping insurers out of suits determining liability of an insured. Fla. Stat. § 627.7262 was amended to require that as a condition precedent to any suit against a liability insurer, a plaintiff must first obtain a judgment against the insured. This statute was recently upheld by the Florida Supreme Court, and applies to all injuries occurring after the law's October 1, 1982 effective date. *VanBibber v. Hartford Accident & Indemnity Insurance Company*, _ So.2d ___; 8 FLW 406 (Oct. 14, 1983). Shortly before the *VanBibber* decision was released, a martitime plaintiff finally prevailed in suing an insurer within this district based on the *Shingleton* theory. *Bangladesh Agricultural*

Development Corporation v. Millbank Shipping, et al., Case No. 81-937-T-EK (M.D. Fla. order of May 25, 1983.

To summarize, it is apparent that most maritime plaintiffs have not been successful in relying on the direct action theory of *Shingleton*. Furthermore, the Florida Legislature has shown great antipathy towards including insurers in cases involving the liability of their insureds. Even if the rule of *Shingleton* applies to the facts here,[2] the Court is of the opinion that there is no direct action against a maritime liability insurer under Florida law. Because general maritime law also does not permit such direct action suits, plaintiff has failed to state a claim upon which relief may be granted against the UK Club. In light of the Court's ruling on this issue, it is unnecessary to address arguments concerning jurisdiction over the UK Club. Therefore, it is

ORDERED:

1. The defendant UK Club's motion to dismiss is granted, and this defendant is hereby dismissed.

2. Defendant UK Club's motion for a protective order is now moot.

DONE AND ORDERED at Tampa, Florida this 20th day of December, 1983.

---

[2] As stated above, the Florida Supreme Court held that the 1982 amendments to § 627.7262 applied only to injuries occurring after the statute's October 1, 1982 effective date. The Complaint does not state exactly when the alleged incidents occurred which damaged the eggs. The only date mentioned is March 30, 1982, when the eggs were loaded in Tampa. While it seems logical to assume they were damaged or destroyed before October 1, 1982, there is no mention of the date of destruction in the complaint.

/s/ WILLIAM J. CASTAGNA
William J. Castagna
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Supreme Court, U.S.
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(2)

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vs.

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN RESPONSE TO PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

A direct action against a maritime insurer does not interfere with any feature of substantive admiralty law nor with any remedy peculiar to admiralty jurisdiction and it does not adversely affect the uniformity of admiralty.

REASON FOR NOT GRANTING THE WRIT

It isn't forum shopping or uniformity in admiralty that upsets the marine insurers; it's a convenient forum with all of the cards on the table. Reading plaintiff's brief,

page 5, one has to chuckle in admiration at the great ingenuity it took to use a clause from a sentence, "Federal admiralty law provides no general right to sue an insurance company directly . . ."[1], to make it seem like admiralty proscribes state law as a source for deciding whether or not a right of action against the insured and the marine insurer matures at the time of the occurrence rather than after judgment. The full sentence illustrates how petitioner manipulated the meaning:

> Federal admiralty law provides no general right to sue an insurance company directly, *Stuyvesant, supra,* and, looking landwards, Texas law refuses to permit a direct action against an insurance company. [at p. 460]

While Texas refuses to permit a direct action against an insurance company, a reader of that case, looking landwards in Florida, finds a convenient forum where the realities and attending manifested rules of fair play are observed. *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969); *Steelmet, Inc. v. Caribe Towing Corp.,* 779 F.2d 1485 (11th Cir. 1986), *modifying on rehearing,* 747 F.2d 689 (11th Cir. 1984) (see Appendix A); and *Quinones v. Coral Rock, Inc.,* 258 So.2d 485 (Fla. 1972). Petitioner argues *Shingleton, supra,* does not embrace a direct action but only per-

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[1] *Continental Oil Co. v. Bonanza Corp.,* 677 F.2d 455 (5th Cir. 1982), reversed in part on other grounds, 706 F.2d 1365 (5th Cir. rehearing 1983).

mits joinder,[2] therefore, since joinder is procedural and Florida procedure may not override substantive admiralty law, a direct action invades the exclusive field of federal jurisdiction over admiralty and maritime matters. Judge Godbold in *Steelmet, supra,* considered Florida's direct action in the context of whether or not it conflicts with any admiralty principle and found that admiralty law neither permits nor expressly forbids a direct action against an insured and its marine insurer. The court quoted language from *Cushing v. Maryland Casualty,* 198 F.2d 536 (5th Cir. 1952), reversed on other grounds, *sub nom. Maryland Casualty v. Cushing,* 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954), as the clearest statement of the absence of any effect on admiralty:

> There is nothing in it [direct action] which undertakes to change the substantive admiralty law, nor does it undertake to deal with a remedy in courts of admiralty. The statute provides only an additional and cumulative remedy at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer. Thus the statute does not conflict with any feature of substantive admiralty law, nor with any remedy peculiar to admiralty jurisdiction. [at p. 1491]

To make matters worse, the point petitioner attempts to make in its brief, page 5:

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[2] Petitioner's interpretation of the Florida Supreme Court's decision in *Shingleton* is frivolous since there is no basis for joinder without an underlying substantive cause of action. It is further refuted by the fact that when the legislature modified the rule as to certain incidents occurring subsequent to October 1, 1982, it did so by proclaiming that the substantive cause of action against the insurer in such cases did not accrue until judgment had been obtained against the insured.

> There is no case law supporting the proposition that a Federal court hearing a case on the basis of admiralty and maritime jurisdiction should adopt state procedure.

ends up being refuted by the very authority upon which petitioner relies, i.e., *Continental Oil Company v. Bonanza Corp.*, 677 F.2d 455 (5th Cir. 1982), reversed in part on other grounds, 706 F.2d 1365 (5th Cir. Rehearing 1983). The Court rejected petitioner's position and said:

> When admiralty law speaks to a question, state law cannot override it, *see D. J. McDuffie, Inc. v. Old Reliable Fire Insurance Co.*, 608 F.2d 145, 147 n.1 (5th Cir. 1979), *cert. denied*, 449 U.S. 830, 101 S.Ct. 97, 66 L.Ed.2d 35 (1980). But when admiralty law is silent, and there is no need for uniformity, state law must be heard, *see American Eastern Development Corp. v. Everglades Marina, Inc.*, 608 F.2d 123 (5th Cir. 1979). [p. 461, n.7]

Simply stated, there is nothing wrong with allowing an injured party a direct, non-circuitous, convenient means of satisfying a claim judicially determined to be owing by the insured if the claim is within the coverage afforded by the policy.

Petitioner cites *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 99 L.Ed. 337, 75 S.Ct. 368 (1955), as authority for the proposition that a direct action against a marine insurer conflicts with the uniformity requirement in admiralty established by U.S. CONST. art. III, § 2. Uniformity, as interpreted by that case, does not extend its reach to every term of every maritime contract:

> But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admir-

> alty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States. As later discussed in more detail, this state regulatory power exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

and the Supreme Court concluded:

> Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. We, like Congress, leave the regulation of marine insurance where it has been—with the States.

The regulatory power of the states was confirmed by the Supreme Court in *Maryland Casualty Co. v. Cushing, supra,* where it answered the question: Does Louisiana's direct action against a marine insurer interfere with the federal limitation proceeding? The Supreme Court's answer was, "No!" and Justices Frankfurter, Reed, Jackson and Burton joined Justice Clark, who saw no necessity for invalidating Louisiana's law by dismissing the direct actions, remanded the case until after the completion of the limitation proceeding. In other words, the court continued the direct actions against the marine insurers until after completion of the limitation proceeding. In that way the damaged claimants were permitted to pursue their actions against the marine insurers so that the shipowner would receive the protection of the Limitation of Vessel Owner's Liability statute, 46 USC §181, et seq., and the injured

seamen and the families of the deceased seamen would receive the protection of the marine insurance.

The *Cushing* case, *supra,* has been cited in a long line of circuit court cases which have preserved the state's direct action against marine insurers without conflicting with the federal provision for a concursus of claims and the limitation of the shipowner's liability. State Establishment's direct action against The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited conflicts with no aspect of the Limitation of Vessel Owner's Liability statute, 46 USC § 181, et seq., because no federal limitation proceeding is pending in any court.

CONCLUSION

Reject U.K. Club's petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3041

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Plaintiff-Appellant,

versus

M/V WESERMUNDE, etc., et al.,

Defendants-Appellees.

No. 84-3161

GREAT AMERICAN INSURANCE COMPANIES,

Plaintiff-Appellant,

versus

UITERWYK LINES LTD., et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(February 25, 1986)

Before VANCE and ANDERSON, Circuit Judges, and HENLEY*, Senior Circuit Judge.

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*Honorable J. Smith Henley, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

The sole issue presented in these two cases is whether a plaintiff may maintain a direct action against a maritime insurer for damage to cargo. In both cases, the district court concluded that such an action may not be maintained and hence dismissed the plaintiffs' direct claims.

In *Steelmet, Inc. v. Caribe Towing Corp.*, — F.2d —, slip op.1584, 1588-90 (11th Cir. Jan. 13, 1986), *modifying on reh'g* 747 F.2d 689, 696 (11th Cir. 1984), this court concluded that Florida law permits direct actions against maritime insurers for claims arising out of events occurring before October 1, 1982, and that state law on this point is not preempted by the federal law of admiralty. Because the causes of action in both cases now before us arose prior to October 1982 and are governed by Florida law, both cases are controlled by our holding in *Steelmet*.

The judgments are REVERSED and the cases are REMANDED to the district court.